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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 777

THE FIRST NATIONAL BANK IN PLANT CITY,
PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

No. 932

WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY,
PETITIONER

v.

FRED O. DICKINSON, JR., COMPTROLLER OF THE STATE OF FLORIDA, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE COMPTROLLER OF THE CURRENCY

OPINIONS BELOW

The opinion of the court of appeals (A. 391–409) is reported at 400 F. 2d 548. The opinion of the district court (A. 365–374) is reported at 274 F. Supp. 449.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1968 (A. 390). The petition for a writ of certiorari in No. 777 was filed on November 25, 1968. By order of December 9, 1968, Mr. Justice Black extended the time for filing a petition for a writ of certiorari in No. 932 to and including January 10, 1969 (A. 410), and on that date the petition was filed. Certiorari was granted in both cases on February 24, 1969, and the cases were consolidated (A. 411). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, for purposes of the reference in 12 U.S.C. 36 to state law as determining whether a national bank may establish a "branch", the threshold determination of what banking activities amount to a "branch" is governed by state law rather than federal law based upon the definition of "branch" in the same section.[1]

STATUTES INVOLVED

The following statutory provisions are set forth in the Appendix hereto: 12 U.S.C. 36, formerly Section 7 of the McFadden Act of 1927, 44 Stat. 1228–1229, as amended (*infra*, pp. 47–51); the original text of Section 7 of the McFadden Act (*infra*, pp. 51–53); Section 659.06 of the Florida Statutes (*infra*, pp. 53–54).

[1] If this threshold matter is governed by federal law, then the further question arises whether the banking activities involved in this case constitute "branching" within the federal definition (see Petition, No. 932, p. 15 n. 15). That question is treated as point two of this brief, *infra*, pp. 42–44, and is discussed more extensively in the brief for petitioner First National Bank.

STATEMENT

1. Section 36 of Title 12 of the United States Code generally prescribes the conditions under which a national bank may retain or establish and operate a "branch or branches". Under subsection (c), new "branches" may be established if the Comptroller of the Currency of the United States approves and if state law would authorize a state bank to establish and operate such a branch. In subsection (f) of Section 36, Congress has specified that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

2. In 1966, the First National Bank in Plant City (Florida) began the operation of an armored car messenger service to and from its banking house, and established an off-premises secured receptacle from which the messenger could pick up items left by customers. The secured receptacle is located in a shopping center one mile from the banking house, and is available for use by persons maintaining accounts with the bank (A. 94). The messenger service also transports cash and checks directly from customers' places of business to the bank, where the funds are credited to the customers' accounts, and delivers to the customers, upon their prior request, cash that has been withdrawn from their accounts (A. 89, 95–96, 100–101, 108–109, 178–179).

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Before inaugurating these services, First National had been advised by the Comptroller of the Currency of the United States (hereafter "U.S. Comptroller") that a national bank may furnish an armored car service if it complies with the provisions of Paragraph 7490 of the Comptroller's Manual for National Banks, which authorizes such service if it is agreed "that the messenger is the agent of the customer rather than of the bank." (A. 378–382).[2] The bank was also informed that it could establish a receptacle in which customers would place night bags to be picked up by messenger, provided that the receptacle

> contain[s] thereon a notice clearly stating that the messenger who will recover the night bags is acting solely as the agent for the customer and that the funds will not be deemed a deposit until delivered to a teller on the bank premises. The notice may also advise that adequate insurance coverage will be provided and proper security measures taken. [A.21–22.]

First National accordingly established the armored car messenger service and off-premises receptacle on the terms specified by the U.S. Comptroller (A. 82–83).

3. Shortly before First National instituted its new services, the respondent, Fred O. Dickinson, Jr., Comptroller of the State of Florida (hereafter "Florida Commissioner")[3] wrote to the bank that he would

[2] The Federal Reserve Board has adopted a similar ruling. See 12 C.F.R. 208.110. With the approval of the Board of Governors of the Federal Reserve System, state member banks can branch on the same terms and conditions as national banks. See 12 U.S.C. 321.

[3] The Florida Comptroller is *ex officio* the state banking commissioner.

consider the armored car service and off-premises receptacle violative of the Florida law prohibiting branch banking; he therefore warned the bank to cease and desist (A. 23–24). First National then brought this action against the Florida Commissioner seeking declaratory and injunctive relief. The U.S. Comptroller intervened on the side of First National while several state banks intervened to support the Florida Commissioner.

The district court held that in 12 U.S.C. 36(f) Congress has itself provided the "exclusive definition" of what will constitute a "branch" of a national bank (A. 371). The court received voluminous depositions and numerous documents; considering these and the "unambiguous contract" (*ibid.*) between First National and its customers, it found that the provision of the armored car service and secured receptacle did not constitute receiving deposits or paying checks and thus did not amount to "branching" within the meaning of the federal definition. Accordingly, the court concluded that the Florida branching statute, Fla. Stat. 659.06(1), on which the Florida Commissioner had relied in objecting to First National's services, "is not operative or controlling in this instance" (A. 371). It went on to hold that the U.S. Comptroller's authorization of such off-premises activities was permissible under the National Bank Act (A. 372–373) and entered judgment against the Florida Commissioner (A. 376–378).

The court of appeals reversed (A. 391–409). It termed "indefensible" any inquiry into whether First National's activities amounted to the establishment of

"offices or agencies, where, as specified in Section 36(f), 'deposits are received, or checks paid, or money lent.'" (A. 400). Subsection (f), the court stated, is "hardly adequate" to determine what is a "branch" (A. 406), and the court would not "tread the twisting paths of agency and contracts urged upon us in this case" (A. 408). Instead, in the belief that "radiations" from this Court's decision in *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, made state norms pervasive, the court held that Florida's concept of "branching" would be "operative and controlling" (A. 392). To hold otherwise, it said, "would severely challenge the policy of 'competitive equality' which the Supreme Court has so recently established [in *Walker Bank*]" (A. 407). It acknowledged that "[t]o be sure, national banks may well fear the authority of state comptrollers to make extreme use of this same defining process, but their recourse must be to Congress which legislated 'competitive equality,' not to the courts who must follow it" (A. 407–408).

A certain amount of confusion is introduced into the court's opinion by its substantial reliance upon a lengthy quotation (A. 401–406) from *State Chartered Banks in Washington* v. *Peoples National Bank of Washington*, 291 F. Supp. 180 (W.D. Wash.). In that case, Judge Lindberg had construed Section 36(f) as providing "a partial definition or a description of what *may be* included within the term 'branch'" (A. 403, italics in original). He termed it a "broad, functional measuring gauge of what a branch may be", for "determining *prima facie* if the supplementing state

branching law should come into play" (*ibid.*). Only when there is some "prima facie" showing that the *federal* criteria have been met did he consider that "state law takes over and may further define 'branch' in such a way as to comport with the state's banking policy" (*ibid.*). The context of his discussion shows that he was concerned not with the authority of state law to *expand* the coverage of the term branch for purposes of Section 36(c) but rather to constrict it.[4] Contrary to this approach, however, which it purported to follow, the court below made no examination at all to determine whether First National's activities

[4] Thus, Judge Lindberg viewed the *Valdosta Bank* case (*Jackson* v. *First National Bank of Valdosta*, 349 F. 2d 71 (C.A. 5)) as imposing on the U.S. Comptroller the obligation to inquire whether, by virtue of state regulations, a new bank facility otherwise within the ambit of the federal definition (and thus prohibited) would for state law purposes be considered merely "an expansion of the existing facility" (and thus permitted) (A. 403).

Judge Lindberg concluded (A. 404) that "[t]he test of 'branchness' in this situation is therefore twofold—(1) Does the facility fit the broad functional definition laid down by Congress in Section 36(f), *and if so*, (2) Does the state law add any [sic] more refinements to the definition?" (Emphasis added.) After analysis of the functions performed by the banking facility involved, Judge Lindberg found that checks were paid "within the meaning of section 36(f)" and that the facility constituted an "additional office" (A. 404–405). He concluded that the "facility is therefore a 'branch' within the meaning of the federal statute (12 U.S.C. § 36(f))" (A. 405). Compare *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 19 Utah 2d 18, 425 P. 2d 414. Then, and only then, did he hold that "[f]rom this point forward, the state statutes and their interpretation as applied to state banks and their branches become the controlling law in determining whether this facility is to be considered a branch or not" (*ibid.*).

met what Judge Lindberg had called the "broad functional definition" of a "branch" in 12 U.S.C. 36(f) (A. 404). Rather, it relied entirely on state law.

Since the pertinent state statute (Fla. Stat. 659.06 (1)(a), pp. 53–54, *infra*) was unclear and had not yet been interpreted by a state court, the court of appeals accepted the Florida Commissioner's cease-and-desist letter as dispositive, simply noting that his conclusion "appears consistent with the policy of the state statute" (A. 408). In light, however, of litigation pending in the Florida courts on the interpretation of the Florida statute,[5] the court observed that the Florida Commissioner's views might not be the "final" interpretation of the Florida law. Accordingly, the case was ordered remanded to the district court for entry of a conditional decree in the Florida Commissioner's favor, but without prejudice to reconsideration if "Florida law is ultimately determined to be different than here expounded" (A. 409).

SUMMARY OF ARGUMENT

I. Set forth in 12 U.S.C. 36 are the conditions under which national banks "may * * * establish * * * branches". One condition is that a "branch" may be established only when, where, and how state law would authorize a state bank to establish and operate such a branch. 12 U.S.C. 36(c). But this condition, like the other conditions of 12 U.S.C. 36, concerns only the activities of national banks which constitute the establishment, retention, or operation of

[5] *Dickinson* v. *Tallahassee Bank and Trust Co.*, 2d Jud. Cir., Leon County No. 68–30.

"branches". And 12 U.S.C. 36(f) specifies that "[t]he term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent." The court below erred in ignoring this sufficient and exclusive federal functional definition in favor of a supposed overriding principle of "competitive equality" between national and state banks, which it thought compelled resort to state law for determination of the threshold question whether a "branch" is involved under the particular facts.

Section 36 of Title 12 embodies the provisions of Section 7 of the McFadden Act of 1927. When Congress passed that statute, for the first time allowing national banks to operate "branches", it was concerned with *expanding* the ability of national banks to compete effectively with state banks. In no sense was there any intention to cut back on other off-premises services—including armored car service—historically rendered by national banks, but which did not amount to branching, as Congress understood, used, and defined that term.

The use of the phrase "competitive equality" in the legislative history of the McFadden Act and in this Court's opinion in *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252, does not warrant the court of appeals' elevation of that phrase to an all-pervasive dogma. To be sure, Congress indicated that national banks were to be accorded competitive equality, "insofar as branch banking was concerned" (385 U.S. at 261), but this proposition

does not justify the leap to the conclusion that Congress abdicated to the states the determination of what constitutes branch banking and is thus subject to state law. The *Walker Bank* case involved questions in the application of state law to facilities that were unquestionably "branches", and this Court's opinion there offers no support for the decision below on the distinct, preliminary question of what constitutes a "branch". Moreover, the goal of equality that the court of appeals sought to serve is chimerical; Congress' selective references to state law in the national bank legislation do not point toward such a goal, which would be inconsistent with, and impossible under, our dual system of state and national banks.

The structure of Section 36 as a whole, as well as its background and legislative history, indicate clearly that subsection (f) was intended to establish an exclusive federal definition of what constitutes a national bank "branch" subject both to the subsection (c) incorporation of state law and to the provisions of other subsections that have no relationship whatever to state norms. Certainly Congress did not intend that varying state conceptions as to what is a "branch" should determine the applicability of these other purely federal provisions, and it would be anomalous to suggest that the meaning of the term should vary within Section 36. Rather, it is clear that Congress used the word "branch" with a consistent meaning *throughout* the section as a whole, and set forth that meaning in the plain language of subsection (f).

The lower federal courts and the executive agencies concerned have consistently interpreted Section 36(f) as setting forth a workable *definition* of "branch", not a merely superfluous statement of the obvious, as the court below viewed it. The reading given by these other authorities is amply supported by the long-established principle that state law cannot intrude into regulation of national banks—or any similar regulatory scheme—where a federal statute addresses itself to the question, absent some explicit evidence, lacking here, that state law was adopted or preserved on the question. Despite the objections of the court below, there is nothing vain about defining "branch" in terms of the "life-blood" functions of banking; it was only these activities that Congress was concerned about regulating through a federal branch-banking statute. Other courts have had no difficulty in applying Section 36(f) as a meaningful standard for determining the coverage of the Act.

The soundness of according Section 36(f) its natural reading as a controlling definition is confirmed by examination of the alternatives. The effect of the ruling below would be to allow the states and their state banking authorities—without a shred of evidence that Congress so intended—to use the open-ended power to define "branch" to bring countless activities of national banks under state regulation. Such a dislocation of control conflicts with the original purpose and continuing theme of maintaining a separate system of national banks, and is hardly supported by anything Congress has said or done in this statute. More-

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over, this fear cannot be termed speculative, for banking authorities in a number of states have already made use of an asserted power to treat a variety of off-premises services rendered by national banks as illegal "branches".

From an administrative standpoint too, the decision below can be seen to be indefensible. Congress has placed the Comptroller of the Currency of the United States in charge of chartering and regulating national banks, and indeed Section 36(c) requires only his approval to establish a "branch". But the Comptroller could not effectively rule either on the lawfulness of services he considered branching or on the permissibility of other off-premises services not so viewed, if his conclusion were subordinated to the vagaries of state administrative interpretation. It has long been settled, and indeed is not disputed here, that national banks need not apply to state banking administrators for permission to engage in any activities. Yet as a practical matter, national banks would find it necessary, under the regime decreed by the court of appeals in this case, to secure just such approval before they could institute new service programs.

II. Applying the federal standards under Section 36(f), the district court properly found, on the basis of the extensive testimony and documents before it, that the activities in question in this case do not amount to "branching" and thus that state law is not made applicable to them by Section 36(c). As is shown in greater detail in the brief for the petitioner national bank, the messenger service and receptacle

do not, in light of the governing contractual relationships, involve either the "receipt" of deposits or the "payment" of checks.

Accordingly, the relief granted by the district court should be reinstated.

ARGUMENT

I. FEDERAL LAW GOVERNS THE THRESHOLD DETERMINATION WHETHER THE ACTIVITIES OF A NATIONAL BANK AMOUNT TO OPERATION OF A "BRANCH", THE PERMISSIBILITY OF WHICH WOULD THEN BE CONTROLLED BY STATE LAW

In the words of the court below, the controlling issue in this case is one of "choice of law" (A. 396): Does state or federal law govern the inquiry whether the First National Bank's receptacle and messenger service constitute a "branch" as that term is used in the National Bank Act? It is undisputed that if these off-premises activities do constitute "branching", then under 12 U.S.C. 36(c) state law determines whether they are lawful.

The provisions that permit "branches" by national banks in accordance with state law were first introduced into the National Bank Act by Section 7 of the McFadden Act of 1927 (A. 397). The McFadden Act included in its subsection 7(f) the further provision, codified as 12 U.S.C. 36(f), that "as used in this section" the term "branch"

> shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * *at which deposits are received, or checks paid, or money lent* [emphasis added].

Nevertheless, the court below refused to hold either that these three "life-blood functions of banking" (A. 407) delineate the activities Congress was speaking about as branching, or that any additional "flexibility" in the application of the statute should come from the "federal common law of branching" (*ibid.*). Instead, the court insisted on "recourse to state law" as if subsection (f) did not exist.

In reaching this conclusion, the court indulged in an apparent non-sequitur. The major premise is indisputable: in Section 36(c) of the National Bank Act, Congress has made the judgment that national banks will be permitted to establish branches whenever, wherever and however state banks are authorized by state law to do so. See *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 385 U.S. 252, 261–262. The court's minor premise, when properly understood, is also sound: Congress elected to key national bank branching to state law in order to place the national and state banking systems in a status of "'competitive equality' insofar as branch banking was concerned". See *Walker Bank, supra,* 385 U.S. at 261. But these premises do not require the conclusion that there is an overriding principle of "competitive equality" that limits all off-premises services of national banks to those that state banks can provide. Nor, more particularly, do they require the conclusion reached by the court of appeals that—notwithstanding the explicit definition in Section 36(f) of what "branch" means throughout the section—Congress must also have intended that variant state norms govern the threshold question of whether

the national bank's activities are to be considered a "branch" at all.

On the contrary, as we shall show, these inferences are manifestly erroneous. The decision of the court below conflicts with the consistent approach of other courts and depends upon *Walker Bank* for support the case does not lend. The decision critically misapprehends the historical context of the reference to state law in Section 36(c), ignores the pertinent legislative history, does violence to the structure of Section 36 as a whole, and erodes the century-old policy of narrowly construing the authority of state officials to regulate the activities of national banks.

A. THE MCFADDEN ACT WAS DESIGNED NOT TO REDUCE NATIONAL BANKS TO EXACT FACSIMILES OF STATE BANKS BUT SIMPLY TO INCREASE THEIR BRANCHING POWERS TO THE LEVEL OF "COMPETITIVE EQUALITY" WITH STATE BANKS

The court of appeals arrived at its decision by a process of deduction from what it supposed to be an immutable and all-encompassing dogma of "competitive equality" between national and state banks in the matter of branching. Indeed, it stated the view that "Congress * * * legislated 'competitive equality'" and "the courts * * * must follow it" (A. 408). The phrase is a catchy one, and it appears repeatedly in the legislative history of the McFadden Act and in this Court's most recent branching opinion, *Walker Bank, supra.* But undiscriminating use of the equality slogan is no substitute for careful reading of the statute in the light of its background and legislative history, which show that what Congress intended was not to *restrict* the operations of national banks to

identity with those of state banks in all respects, but rather to *liberate* national banks from prior restrictions that had placed them at a competitive disadvantage.

1. Until 1927, when the McFadden Act was passed, national banks lacked authority to establish and operate branch offices for the conduct of general banking business. See 29 Ops. Att'y Gen. 81, 86 (1911); 34 Ops. Att'y Gen. 1, 4 (1923). With the sanction of this Court, national banks had, however, engaged from the earliest times in other more limited off-premises activities related to the efficient discharge of their business. See, *e.g., Bank of Augusta* v. *Earle,* 13 Pet. 519. Indeed, in 1870, the Court upheld the power of a national bank to permit its cashier to certify checks elsewhere than at the banking house, explaining:

> * * * The provision of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office—frequently large and important—is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. * * * [*Merchants' Bank* v. *State Bank,* 10 Wall. 604, 651.]

Included among such off-premises services performed by national banks before the McFadden Act, and not considered the operation of "branches," was the furnishing of armored car messenger services, the very activity involved in the present case.[6]

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[6] See 71 Bankers' Magazine 1017 (1906); 81 Bankers' Magazine 739 (1910); 83 Bankers' Magazine 350b, 732, 805 (1911); 84 Bankers' Magazine 746 (1912).

In 1923, the Attorney General advised the Comptroller of the Currency, the officer charged by Congress with the regulation of national banks, that in his opinion the absence of authority for national bank branching would not prevent national banks from opening additional offices "for the transaction of business of a routine character" such as "the receipt of deposits and the cashing of checks for their customers"; the Attorney General reasoned that these activities would not amount to the "general banking business." 34 Ops. Att'y Gen. 1, 3, 5. A year later, however, this Court indicated that this ruling had gone too far in seeking to expand the off-premises functions that national banks might perform. *First National Bank in St. Louis* v. *Missouri*, 263 U.S. 640, 656, 658 n. 1. Instead, the Court specifically endorsed the 1911 opinion of Attorney General Wickersham which, while less expansive, had nonetheless expressly recognized that there is "a wide difference" between "the right to establish branch banks at which a general banking business is carried on" and the mere "appointment of agents to receive and collect money and forward it to the bank." 29 Ops. Att'y Gen. 81, 90. This Court's decision concluded further that state anti-branching laws could validly be applied to national banks since there was no paramount federal law on the question and no impairment of the fundamental purposes of national banks would result.

2. It was against this backdrop that Congress began its consideration of what was to become known as the McFadden Act. This Court's decision in the *Missouri* case was undeniably the catalyst for the meas-

ure. One of the chief sponsors of the bill, Representative Wingo, explained that the Court's decision, coupled with the two opinions of the Attorneys General, had "left uncertain the question of branches or 'financial comfort stations' authorized" by the Comptroller.[7] It was the Banking and Currency Committee's view, therefore, he explained, that "Congress should by affirmative action decide what are the rights of national banks to engage in branch banking."[8]

Friend and foe alike voiced explicit awareness that the bill reflected a determination to *expand* the permissible functions of national banks by, as one critic put it, "legalizing for the first time branch banking by distinctly national banks * * *."[9] One opponent of the bill objected that the "chief purpose of this legislation is the extension of the privilege of branch banking."[10] Indeed, another vocal critic, noting the rather brief interval between the *Missouri* decision and the submission of the McFadden bill, objected to the speed with which "the comptroller's office had the case on appeal ready for Congress."[11]

But while the *Missouri* decision was the immediate occasion for consideration of the bill, the underlying

[7] 66 Cong. Rec. 1777 (1925). See, generally, H. Rep. No. 583, 68th Cong., 1st Sess. (1924); H. Rep. No. 83, 69th Cong., 1st Sess. (1926); S. Rep. No. 473, 69th Cong., 1st Sess. (1926).

[8] 66 Cong. Rec. 1777 (1925).

[9] 67 Cong. Rec. 2843 (1926) (Cong. Nelson). See, also, 67 Cong. Rec. 3247 (1926) (Cong. Cannon).

[10] 67 Cong. Rec. 2850, 2852 (1926) (Cong. Steagall). See, also, 67 Cong. Rec. 2860 (1926) (Cong. Stevenson); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 845 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970.

[11] 67 Cong. Rec. 2842 (1926) (Cong. Nelson).

reasons for it went far deeper. In contrast to the absence of any authority for national banks to establish branches, the laws of many states permitted state-chartered banks to branch. In those states, national banks were "greatly handicapped" [12] by their inability to branch, and the welfare of the national banking system was endangered by the great number of national banks leaving the system to secure state charters.[13] The bill therefore sought to enlarge the powers of national banks in order to give national banks "substantial equality with State banks [under] normal competitive conditions." [14] In explaining why he thought it necessary to increase the authority of national banks to assure them some semblance of "competitive equality", Representative McFadden argued:

> Having complete control of its [Congress's] creatures, the national banks, it can enlarge or restrict at will the powers of such banks for any purpose. Therefore when we are faced with the prospect of a harmful weakening of the national system through the competition of State banks, the logical and reasonable remedy is by the exercise of Federal sovereignty in the only way it should be used, i.e., *by granting its creatures, the National banks, power to compete favorably with State banks.* * * * [66 Cong. Rec. 1646 (1925); emphasis added.] [15]

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[12] 67 Cong. Rec. 3232 (1926) (Cong. Williamson).

[13] 66 Cong. Rec. 1625 (1925) (Cong. Celler).

[14] 67 Cong. Rec. 3232, 3233 (1926) (Cong. Williamson).

[15] *Accord*, 66 Cong. Rec. 1645 (1925); 66 Cong. Rec. 1767 (1925). Compare 66 Cong. Rec. 1764 (1925) (Cong. Lozier).

In 1933, Congress deemed it appropriate to make a "larger experiment with branch banking" and removed the McFadden Act's restriction on national bank branching to branching with-

Another theme also runs through the discussion of the bill. Congress was concerned not only about increasing the viability of the national bank system by allowing its members to open "branches" when state banks could; in addition, the bill sought more generally to enlarge the opportunity of national banks to render the most useful service to their customers. Thus, Representative McFadden explained that

> * * * the main purpose of the bill is to remove certain outstanding handicaps from the national banks which now stand in the way of *carrying on a full-fledged and efficient modern banking business.* * * * [67 Cong. Rec. 2830 (1926); emphasis added.]

The House was frequently reminded that "there is another factor involved besides the question of meeting the competition of [state] banks, and that is the question of service."[16] One of the main purposes of the bill, he remarked, "is a recognition of branch banking as a service proposition * * *."[17]

Thus the McFadden Act was designed to promote, not retard, the competitive position of national banks vis-a-vis their state counterparts. Nowhere in the

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in the limits of the city in which it was established, if state banks could branch outside the city. See S. Rep. No. 77, 73d Cong., 1st Sess., p. 11 (1933). Senator Glass, in reporting the bill that was finally enacted (48 Stat. 189, 190), summed up (77 Cong. Rec. 3726 (1933)): "We here legislate for the national banking system; and why anybody should object to putting national banks on a plane of competitive equality with State banks in the respective States we have been unable to understand. * * *"

[16] 66 Cong. Rec. 1778 (1925) (Cong. McFadden).

[17] 66 Cong. Rec. 1767 (1925); accord, 66 Cong. Rec. 1645 (1925).

history of this legislation is there any hint that Congress objected to the rendering of off-premises services by national banks, that it intended to cutback on those activities—including armored-car messenger service—which for decades had been considered lawful ancillary activities, or that it intended to give state authorities power to control such services.

This Court has observed that the federal government "is a rival chartering authority for banks," and that in order to assure that "these federal institutions may be at no disadvantage in competition with state-created institutions, the Federal Government has frequently expanded their functions and authority." *Franklin National Bank of Franklin Square* v. *New York,* 347 U.S. 373, 375. That manifestly, was the intent of Congress in 1927, an intent that the approach of the court below misconceives and frustrates by converting the "competitive equality" slogan into a device for restricting the services that national banks may provide.

3. Just as the court of appeals was mistaken in its view that the McFadden Act "legislated 'competitive equality'" (A. 408), so also did it misinterpret this Court's opinion in *Walker Bank* as having "established" such a general "policy" (A. 407). *Walker Bank* held only that the enabling provisions of 12 U.S.C. 36(c) did not permit national banks to establish what all acknowledged quite soundly would be new "branches" under circumstances where state banks would not be allowed to establish similar "branches." The only question before the Court was whether subsection (c) absorbs state law to the extent

that it determines not only whether and where national banks may establish "branches" but also by what method; it was only in this context that the Court spoke of "competitive equality," and that only "insofar as branch banking was concerned", 385 U.S. at 261. It does not "establish" any general principle of competitive equality that has any applicability beyond the four corners of subsection (c), which of course comes into play only after it is determined that "branch banking" is in issue. *Walker Bank* expressed no view whatever on the wholly separate question of what constitutes a "branch," and thus is in no way decisive of the present case.

4. Any goal of across-the-board competitive equality would be fundamentally inconsistent with the existence of the dual banking system, which presupposes differences between national and state banks.[18] Had Congress intended such uniformity, it no doubt could have achieved it by a sweeping incorporation of state law into the law governing national banks, but it did not do so. Rather, Congress has referred to state law narrowly, explicitly, and selectively.[19] The result is that national banks have relative disadvantages in some areas of activity, and advantages over state banks in others.[20] Thus, the general prin-

[18] See Note, *Branch Banking: The Current Controversy*, 16 Stan. L. Rev. 983, 990–991 (1964).

[19] See *e.g.*, 12 U.S.C. 24 Eighth, 51, 85, 90, 92a, 214c, 371, as well as the disscussion of Section 7 of the McFadden Act, *infra*.

[20] For example, under Section 659.16 of the Florida Statutes, state banks may maintain their legal reserves in interest-bearing obligations of the United States or in obligations guaranteed by the United States, whereas national banks, under 12

ciple that the court of appeals tried to apply is non-existent.

B. SECTION 36(f) ESTABLISHES AN EXCLUSIVE FEDERAL DEFINITION OF "BRANCH"

The language and structure of Section 36 of Title 12 have—insofar as is pertinent to the problems of this case—remained substantially unchanged since their origin in Section 7 of the McFadden Act.[21] The introductory paragraph of that section provides that:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following * * *.

U.S.C. 461 *et seq.* and 12 C.F.R. 204, must maintain their reserves in the form of non-income producing deposits at the Federal Reserve Bank. Similarly, under Section 659.17 of the Florida Statutes a state bank may lend a single customer up to 10% of capital and surplus, unsecured, and up to 25% of capital and surplus on a secured transaction, whereas a national bank, under 12 U.S.C. 84, is limited to 10% of capital and surplus regardless of security. Also, national banks, as this Court has only recently reiterated, enjoy unique immunity from state sales and use taxes on tangible personal property. *First Agricultural National Bank* v. *State Tax Commission*, 392 U.S. 339. Compare *Franklin National Bank of Franklin Square* v. *New York*, 347 U.S. 373.

[21] Over the years there have been amendments to subsection (c) to expand the geographical limitations upon branching otherwise consistent with state law; originally branches were permitted only within the national bank's home city; in 1933 statewide branching was first permitted, 48 Stat. 189; and in 1935 seasonal agencies were authorized in resort areas subject to certain limitations, 49 Stat. 708. In addition, the original minimum population requirement for establishment of a branch in subsection (d) was superseded by minimum capital requirements, 48 Stat. 190, which were subsequently amended, 66 Stat. 633.

It is thus made clear at the outset that if there is no "branch" as the term is used in Section 36, the various following subsections and their underlying policies are not to apply. Subsection (a) proceeds to deal with the conditions upon which a national bank may retain and operate a branch bank it had in operation at the time of the Act's enactment. Subsection (b) governs the retention and operation of branches by a national bank resulting from consolidation or from conversion. Subsection (d) imposes minimum capital requirements for each branch, and subsection (e) requires the consent of the Comptroller of the Currency before a branch can be moved from one location to another. Subsection (g) covers branches in foreign countries, dependencies, or insular possessions of the United States. And subsection (h) defines the term "state bank" as used in the statute.

The two subsections primarily involved in this litigation are subsections (c) and (f). Subsection (c) sets forth the conditions under which national banks may establish and operate new domestic branches; the condition pertinent to this case is that such a branch may be established only if state law would permit a state bank to branch in the circumstances. In subsection (f), Congress explained what it meant throughout Section 36 when it spoke of "branches", providing that—

> The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which

deposits are received, or checks paid, or money lent.

We believe that this language—which has remained unchanged since the original 1927 enactment—provides a sufficient and exclusive federal definition for determining whether particular off-premises services constitute a "branch" and thus are subject to subsection (c). And the structure of Section 36 as a whole, its background and legislative history and the decisions of other courts all support this interpretation.

1. In its straining to apply a monolithic principle of equality, the court of appeals ignored the natural meaning of the language that Congress used in subsection (f). The court brushed the quoted language aside as "hardly adequate as a definition because it merely sets out in general terms what everyone knows to be the lifeblood functions of banking" (A. 406–407). In effect, therefore, subsection (f) was treated as a superfluous abstract essay. We are at a loss to understand why it should be inconceivable that Congress could have meant to cover as "branches" only those facilities which relate most intimately to the traditional, bed-rock functions of banks. On the contrary, that is just what one would naturally expect. Whether or not a "branch bank" exists would logically depend on the presence or absence of the three fundamental banking activities—the receipt of deposits, the payment of checks and the making of loans.[22]

[22] The formulation in Section 36(f) has been found sufficiently manageable and informative as a definition that it has been copied by at least one *state*, where it has been satisfactorily applied as the test for whether a state bank's off-premises activ-

The definitional nature of subsection (f) is highlighted by the fact that the standards set forth do not relate solely to the subsection (c) incorporation of state law with respect to the establishment of new branches. In addition, these tests also govern matters as to which state law has no pertinence at all: the retention of "branches" in operation at the time of enactment of the McFadden Act (subsection (a)); the population requirements for municipalities having "branches" (subsection (d) as found in the McFadden Act);[23] the requirement that the U.S. Comptroller (alone) consent to a national bank's change in the location of a "branch" (subsection (e)); and the establishment of "branches" abroad (subsection (g)). Certainly, Congress did not intend that the application of these purely federal conditions should vary from state to state according to their separate concepts of branching. And it would be anomalous at the very least to give "branch" in subsection (c) a meaning different from that in the other subsections.

The court of appeals considered that its unnatural reading of the language that Congress used was necessary to avoid "letting the left hand give and the right hand take away" (A. 407), that is, to protect what it regarded as the overriding mandate that there be

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ities amount to operation of a "branch." See *First National Bank of Logan* v. *Walker Bank and Trust Co.*, 19 Utah 2d 18, 425 P. 2d 414. Moreover, apparently satisfied that 12 U.S.C. 36(f) contained a workable definition of a "branch", Congress in 1935 incorporated the same language into the definitional section of the laws pertaining to the Federal Deposit Insurance Corporation. 49 Stat. 684, now 12 U.S.C. 1813(o).

[23] Since replaced by minimum capital requirements.

"competitive equality". As we have shown in the preceding section, there is no such overriding mandate—certainly not a mandate so clear and strong that Congress should be deemed to have intended to deny its words their natural meaning and disrupt the uniform application of other rules of purely federal law to which any such mandate could have no applicability whatever.[24] And Congress' explicit references to state law elsewhere in Section 7 of the McFadden Act make it clear that if Congress had had any such intent it knew well enough how to express it directly.

Even if there were no definitive subsection (f) to be accounted for, the alacrity of the court of appeals in turning to state law for the meaning of "branch" would violate the sound and well settled principle that, in the absence of a clearly manifested congressional intent, words in a federal statute—"[i]ntended to be nation-wide in its application"—are to be given a federal meaning. *New York* v. *Feiring,* 313 U.S. 283, 285; *American Surety Co.* v. *Bethlehem National Bank,* 314 U.S. 314, 316.[25] This rule is especially perti-

[24] Compare *Federal Deposit Insurance Corporation* v. *Tremaine*, 133 F. 2d 827 (C.A. 2), which held that the term "public money" in 12 U.S.C. 90 was to be interpreted as a matter of federal law even though the basic policy behind that statute specifically incorporating state law "was to allow national banks to compete with the state banks on equal terms." 133 F. 2d at 829–830. Accord, *Hood* v. *Hardesty*, 94 F. 2d 26 (C.A. 4). With respect to the competitive equality purpose of 12 U.S.C. 90, see *Lewis* v. *Fidelity & Deposit Co. of Maryland*, 292 U.S. 559, 564.

[25] See, also, *United States* v. *Neustadt*, 366 U.S. 696, 705–706; *Jerome* v. *United States*, 318 U.S. 101, 104; *Federal Deposit Insurance Corporation* v. *Tremaine*, 133 F. 2d 827, 828–829 (C.A. 2) (L. Hand, J.); *Hood* v. *Hardesty*, 94 F. 2d 26, 28–29 (C.A. 4).

nent to national banks, which "are brought into existence under federal legislation, [and] are instrumentalities of the Federal Government." *First National Bank in St. Louis* v. *Missouri, supra,* 263 U.S. at 656. In *New York* v. *Feiring, supra,* the mere use in a federal statute of the word "taxes" without any further specification was sufficient for this Court to hold that "taxes" should be defined as a matter of federal and not state law. *A fortiori* this should be true where Congress has gone so far as to establish specific standards for what the term "branch" "shall be held to include."

2. Both the context in which the McFadden Act was enacted and the legislative history of its consideration by Congress make it clear that it was the intent of the Act to deal uniformly with the subject of national bank branching, defining in itself the activities to which its substantive provisions—including the selective incorporation of state law—would apply.

As we have seen, Congress was prompted to act in order to dispel confusion engendered by somewhat dissonant opinions rendered by this Court and two Attorneys General on the extent of the authority of national banks to render banking services, such as receiving deposits and paying checks, at offices other than their main banking houses. The bill before Congress was, of course, regarded as a "branching" bill (see pp. 17–21, *supra*) and the term had come to have a reasonably well established content. Thus, in the 1911 opinion of the Attorney General which this Court had endorsed in the *Missouri* decision only months before

the McFadden bill was introduced, Attorney General Wickersham had distinguished lawful off-premises activities from unauthorized "branch banks." He explained (29 Ops. Att'y Gen. 81, 88):

> a branch bank requires, in effect, a division of the capital, the working force is organized, and the business conducted as if it were a separate organization, and it competes in all branches of the banking business with other banks in that locality the same as if it were an independent institution.[36]

The discussion of the bill focussed primarily upon "branches" in the archetypical sense—that is, offices where general banking business is carried on. But it is instructive to examine the colloquys that took place with respect to the only other type of off-premises service considered—the so-called "teller's windows" sanctioned by the Attorney General in 1923 for such limited functions as receiving deposits and paying checks.[37] Representative Celler objected to these offices, commenting (67 Cong. Rec. 2860 (1926)):

> Absolutely in effect they are branches where they receive deposits, pay out deposits and lend money, and do an actual banking business. * * *

One of the sponsors, Representative Stevenson, promptly assured him, without referring to any state conceptions, that (*ibid.*):

> Under this bill any place is a branch bank where checks are received, deposits are received

[36] See also 10 St. Louis U.L.J. 581, 585 (1966).

[37] See Annual Report of the Secretary of the Treasury for 1923, pp. 875–877.

> or money loaned. * * * We make that a branch, and therefore under the control of the law. * * *

Earlier Representative Stevenson had explained that the definition of "branch" in what is now Section 36(f) would operate *directly* to require the U.S. Comptroller to treat any offices performing the functions listed as "branches". 66 Cong. Rec. 1628 (1925). And it was made clear that the Act would provide the Comptroller with "direct warrant of law"[28] for authorizing offices for the general banking business as well as

> so-called additional offices or tellers' windows * * * provided their establishment conforms to the requirements for the establishment of new branches by national banks as set forth in section 7(c) * * *.[29]

Such a purpose was utterly inconsistent with the existence of any notion that the definition of "branch," and thus the applicability of Section 7(c), should vary from state to state.

The legislative history contains further direct indications that Congress regarded the McFadden bill as carrying with it an independent, controlling federal definition of "branch". The initial House report on the bill, H. Rep. No. 583, 68th Cong., 1st Sess. (1924), explained (at p. 3) that in what became subsection (f):

> *the term 'branch' or 'branches' is defined* so as to include any form of office established outside of the bank for the purpose of receiving

[28] 67 Cong. Rec. 3230 (1926) (Cong. Celler).

[29] 68 Cong. Rec. 5816 (1927) (Cong. McFadden).

> deposits, cashing checks, or making loans. [Emphasis added.]

Similarly, after noting at the time of enactment that his bill "establishes a national branch banking policy", Representative McFadden explained (68 Cong. Rec. 5816 (1927)) that subsection (f):

> *defines the term "branch".* Any place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money, or transacting business carried on at the main office, is a branch * * *. [Emphasis added.]

3. True to this history, federal courts and executive officers had generally, until the decision of the court below, interpreted the McFadden Act as pronouncing its own independent definition of the term "branch" without requiring either recourse to or reliance on state law for expanding the scope of activities intended to be covered. Thus, barely three years after the passage of the Act, the Attorney General explained (36 Ops. Att'y Gen. 344, 350 (1930)) that Section 7(f) of the Act, now 12 U.S.C. 36(f),

> defines the term "branch".
> Under that definition any place of business maintained by a national banking association where deposits are received, or checks paid, or money lent, other than the main office of the bank, must be considered a branch thereof.

In turning to state law to determine what constitutes a "branch", the court of appeals expressly refused to follow the approach taken by other courts of appeals (A. 399). See *Camden Trust Co.* v. *Gidney,* 301 F. 2d 521 (C.A.D.C.), certiorari denied, 369 U.S.

886; *Whitney National Bank* v. *Bank of New Orleans and Trust Co.*, 323 F. 2d 290 (C.A.D.C.), reversed on other grounds, 379 U.S. 411. See, also, *First National Bank in Billings* v. *First Bank Stock Corp.*, 306 F. 2d 937, 942–943 (C.A. 9); *Lincoln Bank & Trust Co.* v. *Exchange National Bank & Trust Co.*, 383 F. 2d 694, 697 n.3, 699–700 (C.A. 10); *Jackson* v. *First National Bank of Valdosta*, 246 F. Supp. 134, 138 (M.D. Ga.). In those cases the issue was whether certain activities by national banks or their directors constituted the establishment of "branches" for purposes of 12 U.S.C. 36, and the courts resolved these questions as a matter of federal law without reference to state law concepts of branching.

In *Camden Trust*, the District of Columbia Circuit expressly held that there was no branching even though the dissenting judge pointed out that state law was to the contrary; according to the majority, "[b]eyond peradventure, Congress * * * defined the term 'branch' ". 301 F. 2d at 524. The court thus concluded that, since the new operation was not a "branch" under federal law—however it might be viewed by the state—the limitation in Section 36(c) "has no applicability * * *." 301 F. 2d at 525.[30]

[30] See, also, 10 St. Louis U.L.J. 581, 582 (1966):

> The federal statute defines the term *branch*, and it is this definition which the national banks must follow. Therefore, the specific inclusion of drive-in facilities by the state's definition of branch is irrelevant.

Accord, Comment, *Federalism in Interpretation of Branch Bank-*

C. IF THE STATES AND THEIR BANKING AUTHORITIES WERE EMPOWERED TO INCREASE THE SCOPE OF THEIR AUTHORITY OVER NATIONAL BANKS BY DEFINING "BRANCHING", THE EXISTENCE OF A NATIONALLY ADMINISTERED, COMPETITIVE BANKING SYSTEM WOULD BE SERIOUSLY JEOPARDIZED

The rationale constructed by the court of appeals would have drastic consequences beyond the immediate situation that was before it. Although the national bank legislation has entrusted to the Comptroller of the Currency the primary responsibility for regulating the national banking system, the power of definition that the decision below would give to the states would effect a truly revolutionary shift in regulatory control over an important part of the activities of national banks.

Even prior to the passage of the McFadden Act national banks performed a variety of off-premises activities—including operation of armored car messenger services, the very activity involved here—often with the express approval of this Court. See pp. 16–17, *supra*. Today, imaginative and vigorous national banks

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ing Legislation, 32 U. Chi. L. Rev. 148, 159–166 (1964). Cf. *Nuesse* v. *Camp*, 385 F. 2d 694, 701, 705 (C.A.D.C.); *South Dakota* v. *National Bank of South Dakota*, 219 F. Supp. 842, 846 (D.S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970. Compare Handler, *Jurisdictional Abstention in Federal-State Branch Bank Conflicts*, 19 Rutgers L. Rev. 445, 446 (1965):

> It is evident that in actions attacking the legality of a branch established by a national bank the basic question is one of federal law under the National Bank Act, notwithstanding the federal incorporation of underlying state law.

render—with the approval of the federal authorities—many off-premises services and conduct a number of activities not entirely confined to their banking houses, including new-business solicitation, loan closings, sale of money orders and travellers checks, banking by mail, credit card services, various correspondent services, and data processing. Some banks maintain their trust departments in buildings separate from the main bank.[31]

Could Congress, without any discussion and without any express provision in Section 36 or elsewhere, have intended that the lawfulness of such activities should turn on variable and often elusive state conceptions of what constitutes a branch? Surely not. Yet, this is exactly what the court of appeals' decision would entail. Under the court's decision a state would be able to define any off-premises activity as "branching", and thus bring it within the sphere of state law incorporated into 12 U.S.C. 36(c). By so doing, a state could confine the service activities of national banks to the banks' four walls if the state so chooses. This remarkable result would entrust to the states not only the power explicitly granted them in 12 U.S.C. 36(c) to

[31] The restrictions on the activities in which national banks may engage are, of course, not found solely in the limitations on establishing "branches." See, generally, Beatty, *What Are the Legal Limits to the Expansion of National Bank Services?* 86 Banking L.J. 3 (1969).

In part two of this brief we discuss our reasons for believing that the district court properly ruled that the services performed in this case do not amount to branching and are otherwise lawful under the National Bank Act.

determine the lawfulness of "branching" by national banks, but also the power to determine the scope of their own exercise of that control.

Such far-reaching state power—and indeed the power that would be exerted by the Florida Commissioner in the situation involved in this case—would be inconsistent with the fundamental autonomy of the national banking system. Congress has taken pains to shield that system from "the hazard of unfriendly legislation by the States", *Tiffany* v. *National Bank of Missouri,* 18 Wall. 409, 413. Moreover,

> [n]ational banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the lawmaking power of the Government may permit. * * * [*Van Reed* v. *People's National Bank,* 198 U.S. 554, 557.]

Thus, no provision of state law may be applied to national banks if it would "interfere with the purposes of their creation, tend to impair or destroy their efficiency as federal agencies or conflict with the paramount law of the United States." *First National Bank in St. Louis* v. *Missouri, supra,* 263 U.S. at 656.[32] It is unnecesary in this case to probe the precise

[32] Accord, *Lewis* v. *Fidelity & Deposit Co. of Maryland,* 292 U.S. 559, 566; *Franklin National Bank of Franklin Square* v. *New York, supra,* 347 U.S. at 378; *Mercantile National Bank of Dallas* v. *Langdeau,* 371 U.S. 555, 558–559.

extent to which this immunity from state control is constitutionally compelled, in the absence of statutes; here there is ample basis for concluding that, in defining "branch" in subsection (f), Congress has established the "paramount" standard for determining what is a "branch". Compare *M'Culloch* v. *Maryland,* 4 Wheat. 316, with *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339.[33]

The decision below would subject national banks to unfriendly state legislation that would interfere seriously with the purposes of their creation and their efficiency as federal agencies. Far from finding any statutory authorization for such interference, the court below would sanction it in the teeth of statutory language that can only be read as preserving federal authority.

2. The court of appeals did not restrict its reliance on state law definitions to the express provisions of state *statute* law.[34] Instead, the court accepted, at least

[33] See *South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842, 846 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970.

[34] Florida Statute 659.06 is set forth at pp. 53–54, *infra.* It will be seen that the statute on its face is ambiguous as to whether or not Florida law would consider the present activities of First National as "branching." Subsection (1)(a) limits banks to "one place of doing business." The term "place of doing business" is obviously subject to a variety of interpretations. There is a similarly critical ambiguity built into subsection (2), prohibiting the operation of "any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto." For subsection (2) appears to define a "drive-in or walk-up facility" as a facility which provides "one or more tellers

conditionally, the interpretation accorded Florida law by the Florida Commissioner in writing to the First National Bank to object to its proposed services. This holding conflicts with the well reasoned opinion in *South Dakota* v. *National Bank of South Dakota,* 219 F. Supp. 842, 848–850 (D. S.D.), affirmed, 335 F. 2d 444 (C.A. 8), certiorari denied, 379 U.S. 970, and with the approach taken in *Howell* v. *Citizens First National Bank of Ridgewood,* 385 F. 2d 528 (C.A. 3), and *Union Savings Bank of Patchogue* v. *Saxon,* 335 F. 2d 718, 723 (C.A.D.C).[35] This deference is especially incongruous when contrasted with the minimal weight to be accorded lower state courts in determining state law in other contexts. See, *e.g., Commissioner of Internal Revenue* v. *Estate of Bosch,* 387 U.S. 456, 465; *King* v. *Order of United Commercial Travelers of America,* 333 U.S. 153, 160–162; *Roginsky* v. *Richardson-Merrell, Inc.,* 378 F. 2d 832, 851 (C.A. 2).

The court of appeals candidly acknowledged that "national banks may well fear the authority of state comptrollers to make extreme use of this * * * de-

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to serve patrons in vehicles and on foot." In the context of the present case, the question which would be open to dispute is whether First National's activities involve the use of "tellers" within the meaning of the Florida statute. This question is currently being litigated in the Florida courts. See p. 8, *supra.*

[35] Although those cases interpret 12 U.S.C. 36(c) and not 12 U.S.C. 36(f), it should be noted that the insistence in 12 U.S.C. 36(c) on state *statute* law would be put at naught if state administrative interpretations could be applied in interpreting 12 U.S.C. 36(f). For state administrative interpretations of whether or not an activity constitutes a "branch" could be used to circumvent the requirement of 12 U.S.C. 36 that only express state statute law be considered in determining the state law as to whether a "branch" is permitted.

fining process" (A. 407).[36] This warning is more than merely idle speculation. In many states (not including Florida) the state banking departments, either by law or custom, are controlled by persons from or associated with state banks.[37] In most states there is no state statute or case law on what constitutes a "branch", and thus "the most authoritative interpretation of what constitutes a branch under state law would be the current attitude of the state banking commissioners." Comment, *supra,* 32 U. Chi. L. Rev. 148, 161 (1964). And in this connection, we note that the court of appeals suggested that the Florida statute here might be construed to prohibit a bank from conducting *any* activities away from its main office whenever the function performed meets the test of "doing business" for purposes of service of process on foreign corporations (A. 408–409), citing *Phillips* v. *Hooper Chemical Corp.,* 375 F. 2d 189 (C.A. 5) (which recognizes the "minimum contacts" test under Florida law). In view of the vagueness of the "doing

[36] While the court below also suggested it was deferring to state law only in "penumbral" areas (A. 406), the only possible line to demarcate the edge of the "penumbra" is between on-premises and off-premises banking activity. Any off-premises banking activity would appear to be within the penumbra and thus vulnerable to the states' making "extreme use of this * * * defining process."

[37] The United States Comptroller advises us that in 14 states the state banking commissioners are former state bankers, while in only four states are the commissioners former national bankers. Perhaps more significantly, of the 30 states having state banking boards, in at least 21 of those states either by law or custom a majority of the members of the boards are composed of state bankers. In eight states, this majority is required by law.

business'' test and the wide variety of activity that it may be held to cover, it is apparent that this reading of the Florida statute would give the state banking commissioner sweeping authority over the activities of national banks.[38]

3. Another congressionally unintended consequence of the view taken by the court below would be the in-

[38] To illustrate the actual sweep of this ruling, we call the Court's attention to several recent decisions by state banking authorities holding various off-premises activities illegal "branches": in Texas, vending machines for acceptance of deposits, with the company owning the machines acting as agent for the depositor, were nevertheless held to be branches (*American Banker*, September 3, 1968, p. 4); respondent Commissioner of Banking of the State of Florida on October 2, 1968, sent a letter to all state and national banks in Florida declaring "loan production offices" violative of Fla. Stat. 659.06 (1)(a); the Wisconsin Attorney General on October 18, 1968, advised the State Commissioner of Banking that "teller machines" are illegal branches; on October 30, 1968, the Oklahoma Attorney General rendered the same advice to the Bank Commissioner of that state; on the basis of opinions from the Attorney General of Illinois, the Commissioner of Banks and Trust Companies on November 26, 1968, wrote to all banks doing business in that state that deposit machines and loan production offices are prohibited branches; banks in North Carolina were notified by the Commissioner of Banks on January 3, 1969, that relaying of a loan application constitutes illegal branching; on March 31, 1969, the Kentucky Attorney General advised the state's Commissioner of Banking and Securities that a bank's ownership of an off-premises deposit machine would be illegal branching.

And in ruling recently that certain loan-production activities of a national bank would violate Georgia anti-branching laws, the state Commissioner explained: "As you probably know, the Fifth Circuit Court of Appeals has ruled that the National Bank Act requires that national banks conform to state banking authorities' definitions of branch banking." *American Banker*, January 3, 1969, pp. 1, 13.

ability of the United States Comptroller to give authoritative advice as to whether an existing or proposed off-premises activity is a "branch". Section 36 specifies only "the approval of the Comptroller of the Currency" as a prerequisite to establishment of a national bank branch. And it has long been recognized that

> A provision in a State statute requiring consent of the State bank supervisor to State bank branches is not applicable to National banks. The applicability of such a provision would, in effect, give a State Supervisor a veto power over branches of National banks.[39]

Yet, as an unavoidable result of the decision below, the exclusively federal administrative system would be complicated by the practical necessity that national banks obtain rulings from state banking authorities in order to be sure that such an activity would be legal.[40] Indeed, the U.S. Comptroller would be unable to determine whether or not an activity is one for which his approval is required under the statute until he knew whether the state authorities considered it a

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[39] Bell, *National Bank Branches—The Authority to Approve and to Challenge*, 82 Banking L.J. 1, 5 (1965). See *e.g.*, *South Dakota* v. *National Bank of South Dakota*, *supra*; *Attorney General ex rel. State Banking Commissioner* v. *Michigan National Bank*, 298 Mich. 417, 437, 299 N.W. 129, 136.

[40] While 12 U.S.C. 36(c) incorporates state law, it refers to express state law and state statute law, thus obviating any practical necessity for a ruling by the state banking authorities. See *Howell* v. *Citizens First National Bank of Ridgewood*, *supra*; *Union Savings Bank of Patchogue* v. *Saxon*, *supra*; *South Dakota* v. *National Bank of South Dakota*, *supra*.

"branch." The effect would be unacceptable disruption in the administration of the federal banking laws.[41]

These novel and disruptive results, however, are not compelled by the terms of 12 U.S.C. 36. Surely, Congress, in enacting a statute on "branching", had no notion that it was ceding to the states and their banking authorities *carte blanche* authority to regulate all off-premises activities of national banks. Indeed, if we understand respondents' position correctly, even they agree that the court below went too far in holding state law as "controlling" the scope of "branch", for they have agreed that "[s]tate law prohibiting an off-premises banking activity as branching applies to national banks *only if* the activity in question first meets the test of branchness set forth in section 36(f)" (Respondents' Brief in Opposition to Petition of the Comptroller for a Writ of Certiorari, No. 932, O.T., 1968, p. 6). In short, the court of appeals committed reversible error in refusing to determine whether First National's activities constituted establishment of a "branch" for purposes of Section 36(c) as a matter of independent federal law controlled by the standards of Section 36(f).

[41] The decision below may also significantly alter the administration of the federal banking laws with respect to *state* banks. The provisions of 12 U.S.C. 321 pertaining to the conditions on which state member banks of the Federal Reserve System may establish "branches" are keyed to the conditions imposed on national banks under 12 U.S.C. 36. Likewise, since 12 U.S.C. 1813(o) defines "branch" in terms virtually identical with 12 U.S.C. 36, control by the Federal Deposit Insurance Corporation through 12 U.S.C. 1828(d) over branching by state nonmember insured banks would undoubtedly be affected by the court of appeals' decision.

II. THE DISTRICT COURT PROPERLY FOUND THE SERVICES RENDERED IN THIS CASE WITHIN THE NATIONAL BANK'S LAWFUL AUTHORITY

If the Court agrees that the court of appeals erred in failing to apply federal law as the exclusive test of branching, the remaining question is whether First National's armored car service and off-premises receptacle constitute "branches" within the meaning of Section 36. This second question is treated fully in the brief for the petitioner national bank, and we shall discuss it only briefly here.

After careful examination of extensive depositions, describing the operation of First National's armored car messenger service and secured receptacle, and consideration of the contractual relationships established in the use of these services, the district court concluded that the activities were neither "branches" within the meaning of 12 U.S.C. 36 nor otherwise in violation of the National Bank Act. These rulings were sound, and the judgment premised on them should be reinstated.

First National instituted its services on the basis of rulings from the Office of the Comptroller of the Currency (pp. 3–4, *supra*).[42] In interpreting the statutory definition in 12 U.S.C. 36(f) to conclude that these services do not amount to establishment of a "branch", the Comptroller was acting within his lawful province as the official charged with the responsibility for interpreting and applying this section of the National Bank Act. Under settled principles, his

[42] The Federal Reserve Board has made a similar ruling for the banks it regulates. See 12 C.F.R. 208.110.

construction of the statute is entitled to controlling weight unless manifestly or demonstrably unreasonable.[43] The interpretive rulings covering this case are quite consonant with the statute and thus were properly accepted by the district court.

As First National argues more fully in its brief, the operation of its armored car and off-premises receptacle in compliance with the rulings of the U.S. Comptroller does not constitute receiving deposits, paying checks, or lending money—the exclusive tests of branching as prescribed in 12 U.S.C. 36(f). For example, under general principles of law, deposits are not "received" by their placement in the secured receptacle or their pick-up by the messenger, because a bank deposit cannot arise without some unequivocal act whereby both parties express their consent to the creation of the status or debtor and creditor. *E.g., Bernstein* v. *Northwestern National Bank,* 157 Pa. Super. 73, 41 A. 2d 440. See also *Kolt* v. *Cleveland Trust Co.,* 156 Ohio St. 26, 99 N.E. 2d 902; *In re*

[43] See *Securities and Exchange Commission* v. *New England Electric System,* 384 U.S. 176, 185; *Udall* v. *Tallman,* 380 U.S. 1, 16–18; *Board of Governors* v. *Agnew,* 329 U.S. 441, 446–447; *Billings* v. *Truesdell,* 321 U.S. 542, 552–553. Cf. *Community National Bank of Pontiac* v. *Saxon,* 310 F. 2d 224 (C.A. 6); *American Bank & Trust Co.* v. *Saxon,* 373 F. 2d 283 (C.A. 6); *First Hardin National Bank* v. *Fort Knox National Bank,* 361 F. 2d 276 (C.A. 6), certiorari denied, 385 U.S. 959; *Webster Groves Trust Co.* v. *Saxon,* 370 F. 2d 381 (C.A. 8).

Deference to the *federal* administrative interpretation, with its ability to take account of contemporary industry notions of "branch banking", sufficiently accords the "flexibility" which the court below recognized was necessary in order to avoid "devitaliz[ing] section 36(f) with eternally static concepts" (A. 407).

Farmers State Bank of Amherst, 67 S.D. 51, 58–59, 289 N.W. 75, 78–79. But an *agency* agreement between the bank and the customer, such as is required by the Comptroller's rulings and was found by the district court to have been implemented in this case, obviates any expression of such consent. Compare *Moses Lake State Bank* v. *Bell,* 128 Wash. 523, 223 Pac. 587.

Similarly, the district court was correct in its conclusion that these services do not transgress the requirement of 12 U.S.C. 81 that a national bank transact its "general business" only at its main banking house or authorized branches. In light of this Court's express recognition in *Merchants' Bank* v. *State Bank,* 10 Wall. 604, 650–651, that national banks may lawfully conduct specific functions off-premises, "it is not difficult to conclude" (A. 372) that the particular ancillary services rendered in this case do not amount to the "general banking business."

Thus, since the activities sponsored by the First National Bank in Plant City did not violate federal law and were not within the class of activities Congress intended to subordinate to state restrictions, the bank was entitled to the relief it obtained in the district court.

CONCLUSION

The judgment of the court of appeals should therefore be reversed and the cause remanded with directions to affirm the judgment of the district court.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILLIAM D. RUCKELSHAUS,
Assistant Attorney General.
JAMES VAN R. SPRINGER,
Deputy Solicitor General.
PHILIP A. LACOVARA,
Assistant to the Solicitor General.
ROBERT V. ZENER,
ROBERT E. KOPP,
Attorneys.

C. WESTBROOK MURPHY,
Office of the Comptroller of the Currency.

MAY 1969.

APPENDIX

I

12 U.S.C. 36 provides as follows:

The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

(a) A national banking association may retain and operate such branch or branches as it may have had in lawful operation on February 25, 1927, and any national banking association which continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding February 25, 1927, may continue to maintain and operate such branch.

(b)(1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as as branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph

if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county

in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: Provided, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in

the District of Columbia at which deposits are received, or checks paid, or money lent.

(g) This section shall not be construed to amend or repeal sections 601–604 of this title, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws.

II

The original text of Section 7 of the McFadden Act of 1927 (44 Stat. 1228–1229), from which 12 U.S.C. 36 is derived, was as follows:

Section 7. That section 5155 of the Revised Statutes of the United States be amended to read as follows:

"SEC. 5155. The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:

"(a) A national banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.

"(b) If a State bank is hereafter converted into or consolidated with a national banking association, or if two or more national banking associations are consolidated, such converted or consolidated association may, with respect to any of such banks, retain and operate any of their branches which may have been in lawful operation by any bank at the date of the approval of the Act.

"(c) A national banking association may, after the date of the approval of this Act, establish and operate new branches within the limits of the city, town, or village in which said association in situated if such establishment and operation are at the time permitted to State banks by the law of the State in question.

"(d) No branch shall be established after the date of the approval of this Act within the limits of any city, town, or village of which the population by the last decennial census was less than twenty-five thousand. No more than one such branch may be thus established where the population, so determined, of such municipal unit does not exceed fifty thousand; and not more than two such branches where the population does not exceed one hundred thousand. In any such municipal unit where the population exceeds one hundred thousand the determination of the number of branches shall be within the discretion of the Comptroller of the Currency.

"(e) No branch of any national banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

"(f) The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

"(g) This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

"(h) The words 'State bank,' 'State banks,' 'bank,' or 'banks,' as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws."

III

Section 659.06 of the Florida Statutes provides:

(1)(a) Any bank or trust company shall have only one place of doing business, which shall be located in the community specified in its original articles of incorporation, and the business of the bank or trust company shall be transacted at its banking house so located in said community specified, and not elsewhere. A bank or trust company may, however, change the location of its banking house within the community shown in its articles of incorporation with the written approval of the commissioner. Application for such approval shall be in such form and contain such information as the Commissioner may require.

(b) A bank may contract with proper authorities of any elementary or secondary school or institution caring for minors for the participation by the bank in any school or institutional thrift or savings plan, and it may accept deposits at such school or institution, either by its own collector or by any representative of the school or institution who becomes the agent of the bank for such purposes. Withdrawal from any account carried with the bank by any such school or institution shall be made only at the banking house of said bank.

(2) With the prior written approval of the commissioner a bank may operate a drive-in facility or walk-up facility providing one or more tellers to serve patrons in vehicles and on foot. It shall not be necessary that such facility be a part of or physically connected to the main banking room or building of the bank if the facility is located on the property on which the main banking house is situated or on property contiguous thereto. Property which is separated from the property on which the main banking house is situated only by a street, walkway or alleyway shall, for the purposes of this subsection, be deemed contiguous to the property on which the main banking house is situated.

The operation of any drive-in or walk-up facility which is not located on the property on which the main banking house is situated or on property contiguous thereto shall constitute a violation of subsection (1); provided, however, subsection (2) shall not apply to any facilities existing on or prior to January 1, 1965.

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